82-344

Office - Supreme Court, U.S.
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AUG 13 1982
ALEXANDER L. STEVAS,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED OIL MANUFACTURING CO., INC.
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard H. Zamboldi, Esquire

ELDERKIN, MARTIN, KELLY,
MESSINA & ZAMBOLDI
150 East Eighth Street, Box 1819
Jones School Square
Erie, Pennsylvania 16507
Counsel for Petitioner

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED OIL
MANUFACTURING CO., INC.

and

Cases 6 – CA – 12975 and
6 – CA – 13136

AMALGAMATED FOOD
EMPLOYEES UNION LOCAL
590, A/W UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
AFL–CIO

DECISION AND ORDER

On September 5, 1980, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a brief in support of the exceptions, and the Respondent filed cross-exceptions and a brief in opposition to the exceptions of the General Counsel and in support of its cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith and to adopt his recommended Order as modified herein.[1]

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1. Based on our own careful analysis of this case, we have determined that the Respondent, by the number and extent of its unfair labor practices, has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for its employees' fundamental statuatory rights. We therefore find appropriate modification of the recommended order to include broad injunctive language against the further commission of any unfair labor practices by the Respondent. See *Hickmott Foods, Inc.*, 242 NLRB No. 177 (1979).

1. We agree that Administrative Law Judge properly found that Respondent violated Section 8 (a) (1) of the Act by promising wage increases and promotions, and by granting same, for the purpose of discouraging union activity. The Administrative Law Judge finds that such promotions and wage increases were granted to five employees, while actually a sixth employee, Greg Hevell, who is included in the appropriate unit, was also granted a wage increase and promotion at that same time. As in the case of the other five employees, the Respondent offered no business justification for Hevell's wage increase and promotion which occurred shortly after the Respondent gained knowledge of the union campaign. Hevell was only told the raise and promotion was due to the fact that the other employees behind the desk were promoted to shift managers. We conclude, as with the other five employees, that Hevell's wage raise and promotion was given for the purpose of discouraging union activity in violation of Section 8 (a) (1) of the Act.

2. The Administration Law Judge concluded that the unfair labor practices committed herein were not of a degree sufficient to prevent the holding of a free and fair election in the future and dismissed the 8 (a) (5) and (1) allegations in the complaint. We do not agree and we will adhere to the teachings of the Supreme Court as set forth in the *Gissel*[2] case:

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would on balance, be better protected by a bargaining order, then such order should issue.

We find that the unfair labor practices committed by the Respondent warrant the issuance of a bargaining order in this case.

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2. *N.L.R.B.* v *Gissel Packing Co, Inc.*, 395 U.S. 575, 614 – 615 (1969).

The record shows that the Respondent embarked on its course of unlawful conduct upon learning of the Union's organizational campaign, when it coercively interrogated employee Zahuranec concerning the union activity of coworkers; and by instructing Zahuranec to report on union activity of co-workers and by promising wage increases, granting wage increases, and promoting employees to discourage their support of the Union. The above unfair labor practices of the Respondent occurred in a 5-day period from October 28 to November 3, 1979, and directly affected 7 of the 29 unit employees. Further, we are not unmindful of the Respondent's willingness to commit additional unfair labor practices. We note that in March 1980, with no justification other than to punish union supporters, the Respondent has failed to properly reinstate returning strike participants by denying to them overtime hours and pay in violation of Section 8 (a) (3) and (1) of the Act.

The commission of such serious unfair labor practices enumerated above, in a unit as small as the unit involved herein, makes a fair election doubtful, if not impossible. By its actions, Respondent clearly demonstrated to the employees that it alone controlled their economic destiny. After ascertaining the identity of the principal union supporters, Respondent sought to "buy them off" with rewards and promotions. When that failed Respondent took the reverse tack and punished them by denying overtime hours and pay. The message to the employees was that Respondent had the economic means at its disposal to achieve the result it desired. Such a powerful message cannot be erased or forgotten. Therefore, under these circumstances, the use of traditional remedies will not suffice. Accordingly, we conclude that a bargaining order would best protect employee sentiment already expressed through authorization cards.

The Administrative Law Judge found, and we agree that the following employees constitute a unit appropriate for purposes of collective bargaining.

> All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline

station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

We also agree with the Administrative Law Judge that as of November 11, 1979, when the Union made its final demand for recognition, which the Respondent rejected, the Union had been designated by 17 employees in a unit of 29, clearly a majority.

For the reasons expressed above, we find that Respondent violated Section 8 (a) (5) and (1) of the Act by its refusal to recognize and bargain with the Union and that a bargaining order, effective from November 11, 1979, is an appropriate and necessary remedy.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent independently violated Section 8 (a) (1) of the Act by coercively interrogating an employee concerning the union activity of coworkers; by instructing an employee to report on the union activity of coworkers; and by promising wage increases, granting wage increases, and promoting employees to discourage their support of the Union.

4. Respondent violated Section 8 (a) (3) and (1) of the Act by denying unfair labor practice strikers Delores A. Maines, Julio C. Leid, and Eugene S. Zahuranec overtime benefits they enjoyed prior to the strike.

5. All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees, guards, professional employees and supervisors as defined in the Act

constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9 (b) of the Act.

6. The aforementioned Union, since November 11, 1979, and at all times material herein, has been and is now the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

7. Since November 11, 1979, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all its employees in an appropriate unit, and thus has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, United Oil Manufacturing Co., Inc., Kylertown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1 (c):

"(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act."

2. Insert the following as paragraph 2 (a) and reletter the subsequent paragraphs accordingly:

"(a) Recognize, effective from November 11, 1979, and, upon request, bargain collectively and in good faith with Amalgamated Food Employees Union Local 590, a/w United Food and Commercial Workers International Union, AFL–CIO, as the exclusive representative of all employees in the appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is

reached, embody such understanding in a signed agreement. The appropriate unit is:

> "All full-time and regular part-time employees of the Employer at its Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees, excluding employees of the leased operations, confidential employees, and guards, professional employees and supervisors as defined in the Act."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. March 10, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interrogate our employees concerning their union activities or tell them to spy on coworkers and to report on their union activity.

WE WILL NOT promise our employees benefits, grant them benefits, or promote them in order to discourage them from engaging in activity on behalf of Amalgamated Food Employees Union Local 590, a/w United food and Commercial Workers International Union, AFL–CIO, or any other labor organization.

WE WILL NOT discourage membership in the aforesaid Union, or any other labor organization, by denying employment benefits to our employees because they have engaged in activity on behalf of a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL restore overtime benefits enjoyed prior to the strike by Julio Leid, Delores Maines, and Eugene Zahuranec, and we shall make them whole for losses they sustained because we denied such overtime after the strike, with interest.

WE WILL recognize, effective from November 11, 1979, and, upon request, bargain collectively and in good faith with Amalgamated Food Employees Union Local 590, a/w United Food and Commercial Workers International Union, AFL–CIO, as the exclusive bargaining representative of all employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an under-

standing is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All full-time and regular part-time employees at our Stop 21, Kylertown, Pennsylvania, facility, including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

United Oil Manufacturing Co., Inc
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building, 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED OIL
MANUFACTURING, CO.,INC.

and Case Nos. 6-CA-12975
6-CA-13136

AMALGAMATED FOOD
EMPLOYEES UNION LOCAL
590 a/w UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
AFL-CIO

Raymond Jacko, Esq., of
Pittsburgh, PA, for the
General Counsel.
Richard H. Zamboldi, Esq. and
Richard W. Perhacs, Esq.
(Elderkin, Martin, Kelly,
Messina & Zamboldi), of
Erie, PA, for the Respondent.

DECISION

Statement of the Case

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by the undersigned on May 29 and June 23, 1980, in Clearfield, Pennsylvania, upon an initial unfair labor practice charge filed on December 7, 1979, and a consolidated complaint issued on March 14, 1980, which, as amended, alleged that Respondent independently violated Section 8 (a) (1) by coercively interogating employees concerning union activity, by surveillance of union activity, by instructing an employee to report on union activity of co-workers, and by promising and

granting increases and promoting employees to discourage union activity, and that Respondent violated Section 8 (a) (3) and (1) of the Act by discharging employee Andrea Winters, in reprisal for union activity. The complaint further alleged that a strike commencing on or about November 12, 1979, was caused and prolonged by the aforesaid unfair labor practices, and that Respondent violated Section 8 (a) (3) and (1) of the Act by discriminating against certain strikers upon their unconditional offer to return to work. Finally the complaint alleged that Respondent violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and bargain with the Union as majority representative of employees in the appropriate unit under authority of *N.L.R.B.* v *Gissel Manufacturing Company*, 395 U.S. 575 (1969). In its duly filed answer, Respondent denied that any unfair labor practices had been committed. After close of the hearing, briefs were filed on behalf of the General Counsel and the Respondent.

Upon the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a corporation with a place of business in Kylertown, Pennsylvania, the sole facility involved in this proceeding, from which it is engaged in the operation and management of a truck stop consisting of a retail gasoline station, diesel fuel station, store and motel. During the 12-month period ending December 1, 1979, in the course of said operation, Respondent derived gross revenues exceeding $500,000, and received goods and materials valued in excess of $5,000 shipped directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is now, and had been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that Amalgamated Food Employees Union Local 590 a/w United Food and Commercial Workers International Union, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issues

At the heart of this proceeding is the question of whether a remedial order directing Respondent to recognize and bargain with the Union is justified by the instant record. It is the theory of the General Counsel, that Respondent, shortly after the advent of union activity at the Kylertown truck stop, gained knowledge thereof through an informer, and embarked on a campaign of intimidation, commencing with an instruction that said employee report on events taking place at the first union meeting. It is contended that an act of union-related reprisal took place that same evening, following unlawful surveillance of the union meeting, when Respondent discharged Andrea Winters. Additionally, during the following week it is claimed that Respondent promised increases, promoted 5 employees and granted them increases to discourage union activity. According to the complaint, Respondent's initial unlawful reaction to the organization cameaign was followed by a strike which commemced on November 12, 1979, and which continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers. It is the General Counsel's contention that this was an unfair labor practice strike, and that Respondent violated Section 8 (a) (3) and (1) of the Act, by failing to properly reinstate strikers Delores Maines, Julio C. Leid, and Eugene Zahuranec.

B. Background

This case is concerned with the segment of an initial organization campaign waged among Respondent's 30 employees at "Stop 21" on Interstate 80 in Kylertown, Pennsylvania. At that location, Respondent owns and operates a gasoline and diesel fuel station, a store, and a motel. Also at that site are other services, including a restaurant, a truck garage, and a barber shop, none of which are operated by Respondent, but by third persons pursuant to a lease or concession agreement. Employees of the leased operations are not involved in this proceeding even though within the Union's organization effort.

Respondent's work force at the Kylertown truck stop is subject to overall supervision by General Manager Cecil Felix. Essentially all alleged unfair labor practices set forth in the complaint are attributed to Felix.

There was no history of union representation at the truck stop. The instant organization campaign opened in late October 1979[1]/when employee Julio Leid contacted the Union and ultimately arranged for a union meeting to be held at her home at 4:00 p.m. on Sunday, October 28. Respondent admits that in the early afternoon on October 28, prior to the meeting, General manager Feliz was informed thereof. Five employees attended the first union meeting; namely, Leid, Eugene Zahuranec, Joyce Hockenberry, Sharon Shimmel, and Robert Pearce, Jr. All attending signed authorization cards, and thereafter signatures were solicited from among co-workers at the truck stop.

The General Counsel claims that Cecil was in the vicinity of Leid's home on October 28 at a time coresponding to the union meeting, under circumstances constituting surveillance violative of Section 8 (a) (1) of the Act.

Dischargee Andrea Winters did not attend the October 28 union meeting. However, she claims to have signed a card at the

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1. Unless otherwise indicated all dates refer to 1979.

home of Leid, shortly before reporting to work for her 11 p.m. shift. Upon arrival for work that same evening, she was discharged by Felix. The General Counsel claims that this discharge was for discriminatory reasons violative of Section 8 (a) (3) and (1) of the Act.

At some during the week following the October 28 union meeting one employee was told he would receive a wage increase and at least five others were reclassified and designated as "managers", while being afforded wage increases. Here again, Respondent is charged with 8 (a) (1) violations.

On November 3, the Union's International Representative George Nestler personally contacted Felix, demanding recognition of Respondent's employees in the appropriate unit. This was followed by a letter dated November 5, directed to James Gray, Respondent's president, which also included a demand for recognition. In a telephone conversation on November 11, Felix informed Nestler that recognition would not be conferred, as he wished a "fair election". In that conversation, Nestler charged that Felix had theretofore interfered with the possibility for a fair election.

On November 11, a union meeting was held wherein employees voted to strike in protest of the alleged unfair labor practices. The strike began on November 12, 1979, and continued until March 10, 1980, when an unconditional offer to return to work was made on behalf of the strikers.

In the interim, the Union filed a representation petition on December 7, 1979 in Case No. 6-RC-8654. After hearing thereon, the Regional Director issued a Decision and Direction of Election on January 29, 1980. On March 19, 1980, the Union's request to withdraw said petition was granted.[2]

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2. On behalf of the Respondent it is contended that the various actions of the Union with respect to the representation proceeding, in which the unit preference expressed by the Union was rejected, signifies that the Union was of the position that a fair election could be conducted. Whatever interpretation might be placed on the Union's tactical actions in that connection, whether or not a bargaining order should issue under the *Gissel* doctrine must be assessed in the light of unfair labor practices substantiated by the record in this proceeding. All other references are irrelevant to that inquiry.

By letter of March 10, 1980, an unconditional offer to return to work was made on behalf of the strikers. The General Counsel contends that the strike was an unfair labor practice strike, that the participants therein were entitled to the protection accorded unfair labor practice strikers, and that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to restore Delores Maines to her former position, and by denying strikers Leid, Zahuranec, and Maines, overtime assignments that they had regularly enjoyed prior to the strike.

C. Concluding Findings

1. Interference, Restraint, and Coercion

a. The October 28, Union Meeting

On October 28 a union meeting was held as scheduled at the home of Julio Leid. Eugene Zahuranec was among the employees invited to attend. Because scheduled to work from 10 a.m. to 6 p.m. on October 28, according to Zahuranec, at approximately mid-day he went to the office of Felix, and inquired as to how Felix felt about a union. Felix indicated that he did not know, but questioned Zahuranec as to why he had asked. Zahuranec reported that a union meeting was to be held at Leid's house at 4 p.m. and requested time off to attend. Felix then queried Zahuranec as to the identity of others who were to attend. Zahuranec replied that fuel jockeys, desk people and field clerks would be there. Felix then specified individuals, asking if they would attend. Zahuranec denied knowledge. Felix told Zahuranec to go to the meeting and to call him at the conclusion thereof to report what had happened. In the course of the conversation, Felix opined that the Union was no good, and that it had caused problems at another truck stop.[3]

3. Felix admitted to this conversation and that he was infomed of the union meeting. However, he denied questioning Zahuranec as to any aspect of it, but claims that all information was volunteered by the latter. He also denied that he made a request that Zahuranec report back on what transpired at the meeting. I prefer the testimony of Zahuranec, who at the time of the hearing, remained in Respondent's employ. Zahuranec's account seemed the more likely and was entirely believable. Basically, I did not regard Felix as a trustworthy witness.

According to the further testimony of Zahuranec, on Monday morning, October 29, he received a telephone call from Felix, in which the latter inquired as to what went on at the meeting, who attended, and who the instigator of union activity was. In response, Zahuranec identified those who attended, and indicated that it was his understanding the Union had been contacted by Julio Leid. Felix went on to question Zahuranec as to why he had not called Felix, and as to whether restaurant employees were involved. At the close of the conversation, Felix appealed to Zahuranec to refrain from disclosing that Felix was aware of the organization effort. [4]

Based upon the credited testimony of Zahuranec, I find that Respondent violated Section 8 (a) (1) of the Act by Felix questioning the latter concerning union activity of co-workers, by instructing Zahuranec to report on the union activity of co-workers, and by his broad questioning of Zahuranec as to what transpired at the union meeting of October 28.

The complaint also alleges that Respondent violated Section 8 (a) (1) through Felix's suveillance of the union meeting. In this regard, it is clear, that prior thereto, Felix had acquired knowledge of the time and location of the meeting, which took place between 4:00 and approximately 5:00 p.m. on October 28 as scheduled. Leid testified that at approximately 4:45 or 5:00 p.m. as she and union representative Nestler attempted to

4. Here again I credit Zahuranec. Felix admitted to calling Zahuranec at 9 a.m. on October 29, but claims that he did so to find out whether Zahuranec's father was going to do a personal favor for him. After discussing that subject, it is the sense of Felix's testimony, that Zahuranec injected the Union, volunteering the names of the people who attended the union meeting. Felix denied asking further questions and again indicated that Zahuranec volunteered to keep him informed as to union activity. Felix further testified that a few days later, Zahuranec approached him asking Felix to tell anyone inquiring as to their prior phone conversation, that it merely related to the favor Felix requested of Zahuranec's father, and that the party Zahuranec told Felix about " . . . was just a party at Julio's. . . . " I have heretofore expressed doubt concerning Felix's credulty. Here again, his testimony did not ring true, and I regarded that of incumbent employee Zahuranec as the more probable.

obtain organizing materials from Nestler's car which was then parked in front of her home, she observed Felix in his personal automobile pass by her house at a rate of speed which she estimated to be at between 25 and 30 mph in a 45 mph zone.[5] Felix denied that he was in the vicinity of Leid's home on October 28.

Nothwithstanding my misgivings concerning the verity of Felix, and accepting the fact that Leid was an incumbent employee at the time of the hearing, I find the surveillance allegation unsupported by credible proof. The testimony of Leid and Nestler was gravely suspect. As shall be seen, *infra*, Leid in collaboration with Andrea Winters and Vera Lockey afforded highly material testimony in connection with the discharge of Winters which impressed the undersigned as pure fabrication. As for Nestler, his avowed ability to make an after the fact positive identification on the basis of an instantaneous, passing glimpse at dusk of one he had never before seen, created sufficient doubt to reflect adversely upon his credulity. I did not believe Leid or Nestler and this allegation based upon their testimony shall be dismissed.[6]

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5. Leid was corroborated by Nestler, who related that though he did not know Felix at the time, his presence was called to his attention by Leid whereupon he immediately turned, observing the driver of the automobile. Although Nestler at the time had not as yet met Felix, he asserted that he was able to confirm the identification upon subsequently meeting Felix 5 days later.

6. The complaint alleges that Respondent independently violated Section 8 (a) (1) of the Act by informing its employees on or about October 28, that it was futile for them to select the Union as their bargaining representative. From my examination of the record, no evidence was adduced in substantiation of this claim by the General Counsel, and this allegation is dismissed.

b. The Promise of Wage Increase and Grant of Promotions and Wage Increases.

Uncontradicted evidence establishes that on November 3, enclosed with their paychecks, *certain employees* received an announcement signed by Felix, which indicated as follows:

To: All Employees of Stop 21 Fuel Station
Subject: Assignment of Areas of Responsibility and Rate Change.

As of 27 October 1979, the following employees of Stop 21 are designated Shift managers and are responsible for supervising the working activities of personnel assigned to their shift:

	Rate
Joyce Hockenberry	$3.55
Jean Kerns	$3.35
Marlene Grate	$3.10
Delores Maines	$3.10
Julio Leid (Store Manager)	$3.50

_____ [s]
Cecil Felix, Manager

Julio Leid, at times prior to the above announcement, had been employed for 2 years as store cashier. According to her uncontradicted testimony, Leid, on October 29, was first informed as to the possibility of a promotion and wage increase. At that time, she was called into the office of Felix, who indicated that he was considering giving her more authority, inquiring further if Leid were willing to assume management of the store at a 20 cent increase. In this instance I accept Leid's uncontradicted testimony. As mutually corroborative testimony by Felix and Zahuranec reveals, this occurred after Felix had received information pointing to Julio as the instigator of union activity.

Respondent's evidence includes no explanation for this sudden upgrading of the above-mentioned employees and the grant of an increase, shortly after acquisition of knowledge that a union campaign was in progress. Pursuant to established Board

precedent, new benefits announced and/or granted during an organization campaign are unlawful unless the employer can establish that such benefits were based upon business justification disassociated from the existence of union activity. While no effort has been made by Respondent to refute the inference of illicit motiv[illegible] in this respect, the 8 (a) (1) allegations are bolstered by the propensities disclosed through testimony of former shift manager Hevell. The latter credibly, and without contradiction testified that subsequently during the course of the strike, Felix told Hevell that if he had known about the Union sooner, he would have reclassified the "fuel jockeys" as "island supervisors". Based upon the foregoing, I find that Respondent violated Section 8 (a) (1) by promising wage increases and promotions, and by granting same, for the purposes of discouraging union activity. [7]

2. The Alleged Discrimination

a. The Discharge of Andrea Winters

The discharge of Winters occured on October 28, shortly after 11 p.m., several hours after the union meeting which took place at the home of Julio Leid. She did not attend that meeting, but claims, with corroboration from Leid, that in route to work shortly before 11 p.m., she stopped at Leid's home and executed a signed authorization card.

Prior to her discharge, Winters had been employed as a fuel clerk (cahsier) on the 11 p.m. to 7 a.m. shift. Undisputed credited

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7. It is also noted in this respect that Zahuranec credibly testified that on or about October 30, Felix advised Zahuranec that a 25-cent wage increase had been obtained for him. Zahuranec acknowledged that he never received the increase. Although Felix denied the foregoing, he related that during the first week after the union meeting Zahuranec approached him, requesting a raise. Felix's testimony in this respect conformed with a consistent pattern of unbelievable testimony through which Felix shifted statements to Zahuranec, which I believe he himself made. Felix also admitted that he sought approval of said increase from headquarters. Although Zahuranec's testimony in this respect is somewhat cumulative, I credit his account as the more likely.

evidence establishes that at least since January 1979, Winters in that capacity sustained cash shortages at the close of her shift more frequently than any of her co-workers.

The groundwork for her discharge originated with action by respondent taken prior to the advent of union activity. Thus, on September 25, 1979, a notice to employees was posted which recited as follows:

To: All Fuel and Store Clerks

1. As of September 25, 1979, all employee [sic] are responsible for any and all shortage [sic] amounting to two dollars ($2.00) and over.

2. Shortage will be paid on the first payday after shortage has occurred.

3. After the second offense amounting to fifteen dollars ($15.00) and over; means automatic dismissel uless [sic] proven that the shortage was not entirely their own fault.

Winters, though aware of this newly established policy, on October 24, 1979, had a cash shortage of $19 which was unexplained. Again, on Saturday, October 27, 1979, Winters was short, $28.32.

Judy Rolley, Felix's secretary, confirmed credibly that there was no explanation for Winters' shortage of October 23. She related that, as part of her duties, she checked the "daily truck reports" completed by fuel clerks for each shift and compared the cash on hand at the end of each shift with register readings and the data entered by each individual cashier on her respective report. Rolley testified that she reported for work at 9 a.m. on Sunday, October 28.[8] Upon her arrival, Felix who had apparently

8. Rolley credibly testified that, while she normally worked Monday thru Friday, she also worked weekends when the end of the month fell on a weekend or prior to taking a vacation. I find, consistent with her testimony, that she worked on October 28, because her scheduled vacation was to begin that following Monday.

pulled the reports from the following evening, informed her that Winters had been short again, and instructed her to check out Winters' report because she was "going down the road if she was short." According to Rolley, she carefully checked the data relative to Winters' cash status on October 27, and could find no explanation for the shortage. Before leaving at approximately 1 p.m. on October 28, Rolley informed Felix to this effect, at which point Felix indicated "I've had it with that damn girl . . . she's going down the road."

According to Winters' own testimony, she had not manifested any support of the union till 10:45 p.m. on October 28. further, there is no hard evidence, nor basis for fairly drawn inference on this record, that as of 1 p.m. on October 28, Respondent suspected that Winters had engaged in union activity.[9]

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9. Although Winters, with corroboration from Leid, testified that she signed a card at approximately 10:45 p.m. on Ocotber 28, deep suspicion is held that such was the case. Winters, though invited, did not attend the union meeting earlier that day. According to Leid, "something" came up and Winters could not attend. Winters own explanation for her absence was garbled and unimpressive. Questions held as to Winters procrastination concerning the Union on October 28, were intensified by the testimony of Vera Lockey. Lockey, a good friend of Winters, lived only a few doors away from Leid. Though among those invited to the meeting, she, like Winters did not attend. Within Lockey's testimony was a reference plainly calculated to support a contention that Respondent had reasonable basis for believing that Winters, prior to her discharge, had participated in union activity. Thus, Lockey testified that Winters was at her home at least twice on October 28, first between 2:00 and 4:00 p.m. and second between 6:00 and 10:00 p.m. This testimony of Lockey places Winters within a few hundred feet of Leid's home, the site of the meeting, during a substantial segment of the day. Yet, as the testimony offered by the General counsel would have me believe, she did not attend the meeting or sign a card prior to her final departure from Lockey's home at 10 p.m., but returned to the area a third time in route to work to sign a card. Lockey's explanation for not attending the union meeting was also unbelievable. According to Lockey, she had a hangover as a result of a night on the town in State College, Pennsylvania, with Winters the previous evening. Respondent's Exhibit 6, however, shows that Winters worked the 11 p.m. to 7 a.m. shift on Saturday, October 27. The testimony of Lockey and Winters that, on October 28, they separately went to the home of Leid where they signed cards is rejected as predicated upon unvelievable testimony. My disbelief of this entire segment of the General Counsel's proof contributed to my adverse impression of Leid's general reliability. Her attempt at corroboration in connection with this highly material issue, placed Leid in complicity with others in an effort to bend the truth in support of the claim that Winters was a victim of unlawful discrimination. Her testimony in other areas has been rejected where not corroborated by evidence from credible sources or unless based on facts within the knowledge of the Respondent but not contradicted.

Respondent has offered convincing proof that Winters violated its published policy concerning shortages,[10] and that its action in terminating her was consistent with the declared penalty of "automatic" discharge. This evidence was not countered, on behalf of the complaint, by credible proof either that Winters prior to her discharge engaged in union activity, or that Respondent had any reasonable basis for suspecting that she had.[11] Also absent was evidence showing that the shortage policy had been disparately applied. In sum, I find that the General Counsel has not maintained by preponderance of the evidence that Winters was terminated in violation of Section 8 (a) (3) and (1) of the Act, and accordingly, the complaint shall be dismissed in that regard.[12]

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10. I did not believe the testimony of Winters that her shortage of October 27 was not her fault, but attributable to erroneous recordings on the gas pumps. This constituted a self-serving argument on behalf of an unreliable witness and was not taken by the undersigned as anything more. The fact that her cash checked out with all other documentation would not necessarily mean that the pumps were in error or that a shortage did not occur which could fairly be deemed the responsibility of Winters.

11. The General Counsel claims that a statement made by Felix to Hevell on October 28, indicated that Felix suspected that Winters and her friend Lockey were involved in the organization effort. This related to testimony of Hevell that Felix, as he could recall, told him that Winters would be discharged, adding that he wished that Vera Lockey would quit. Although this testimony plainly discloses that Felix disapproved of Winters and Lockey, to assume that his attitude was in any sense influenced by union activity would be to indulge in brazen speculation.

12. In so finding, I have not overlooked certain circumstances surrounding the discharge, including the fact that Felix returned to the truck stop on Sunday, to personally effect the discharge, rather than using Hevell to communicate to Winters his intention in that regard. Any suspicion, however, that might arise therefrom, when weighed against other credible facts on this record, fails to overcome the deficiencies in the General Counsel's case. Also considered, but deemed inconclusive, was the fact that during a prehearing interview with an agent of the National Labor Relations Board, Felix expressed a ground unrelated to shortages as contributing to the discharge decision. In this latter respect, this reference is deemed no more than an aggressive act of bias emerging from human tendency. One embroiled in controversy frequently overreaches in attempting to caste the opposition in the most unfavorable light possible. It is assumed that no more was involved here. The foregoing was not viewed as rising to the level of a shifting defense undermining the otherwise valid grounds for the discharge.

3. The Alleged Post-Strike Discrimination

a. The Nature of the Strike

The complaint alleges that the strike which began on November 12, was caused and prolonged by Respondent's unlawful conduct and hence was an unfair labor practice strike. In this connection, it is noted that on November 11, the Union was first informed that Respondent would not honor its request for recognition, but preferred an election. Later that evening, a union meeting was held. According to George Nestler, the Union's international representative, the purpose of that meeting" ... was to inform all the people of the events that had happened and what the response of the Company was, at this time ... And what we, as a group, could do in the future to gain recognition." He claims that because of the alleged unfair labor practices, including the wage increases, the discharge of Winters, and the surveillance of the October 28 union meeting, he conducted a strike vote.[13] Those attending the November 11 meeting opted to strike and pickets appeared at the truck stop the next day.

Having found that prior thereto, Respondent created a serious obstacle to representation by virtue of its unlawful attempt to influence employees by promises of benefits, and actual grant of promotions and wage increases, I find that the strike which began on November 12, was caused at least in part, by the aforesaid unfair labor practices.[14]

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13. The only other unfair labor practices involved here related to the conversations between Felix and Zahuranec. Yet, there is no evidence that Zahuranec ar of November 11, had communicated the substance of those incidents to tne Union, or for that matter, to anyone else. Indeed, the only interrogation mentioned in Nestler's testimony related to that of employees at the Bell restaurant. The unfair labor practice findings based on Zahuranec's testimony are not considered as among the motivating causes of the strike.

14. See *C & E Stores, Inc., C & E Super Value Division*, 221 NLRB 1321, 1322.

On March 10, 1980, the strike ended, with an offer to return to work made on behalf of all strikers unconditionally.[15] Apparently, pursuant thereto, all strikers who wished reemployment were restored. The 8 (a) (3) allegations based upon the post-strike treatment are limited to alleged curtailment of the employment benefits of strikers Leid, Maines and Zahuranec upon their reinstatement after the strike.

b. Julio Leid

Leid testified without contradiction and in this instance credibly that prior to the strike, she, during overtime hours, assisted in the taking of a physical inventory at the end of each month. It is undisputed that upon her return, Leid was not afforded such opportunity to earn overtime pay.

Because of the nature of the strike, Respondent, pursuant to established Board policy, was required to reinstate "all its employees who participated therein to their former positions or if such positions no longer exist, to substantially equivalent positions, without impairment of their seniority and other rights and privileges dismissing, if necessary, any persons hired as replacements on and after "the inception of strike action.[16] Where restoration is not accorded under such conditions, the burden is upon the employer to demonstrate" ". . .it had a substantial and legitimate business reason for not doing so."[17] In the case of Leid, the defense is based exclusively upon testimony of Felix through which he vaguely alluded to problems experienced with the accuracy of the inventory. To accomodate them, according to Felix, he dispensed with overtime, instead taking the inventory with assistance of the employee on duty at the time. No explanation was offered as to how the accuracy of the inventory could be improved under such procedure. Indeed, one would naturally assume that the opportunity for error would be enhanced by the utilization of an employee whose responsibility for ongoing store operations would be a distracting influence upon her role in connection with the inventory.

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15. See Joint Exhibit 2.

16. See *Larand Leisurelies, Inc.*, 213 NLRB 197, 198 (1974).

17. See *Weather Tee Corporation*, 238 NLRB 210, p. 4 (1978).

I find the testimony of Felix in this respect to be unpersuasive and incredible. As Respondent has failed to establish any supervening economic justification since the commencement of the strike for its denial of overtime to Leid, it thereby violated Section 8 (a) (3) and (1) of the Act by failing to extend the same privilege upon her restoration at the conclusion thereof.

c. Delores Maines

Prior to the strike, Maines was a fuel desk cashier. Upon her return to work in 1980, she was not accorded that position, but was restored as a store cashier, a position she had not previously occupied. This occurred in spite of the fact that Cindy Carson, an employee who did not occupy a fuel clerk position prior to the strike, continued thereafter to be retained in that capacity.

Maines testified that she did not like the position of store clerk as well as her pre-strike job. However, the former seemed to the undersigned to involve less onerous work and Maines did not advise management concerning her preferences until May 1980. When she did so, she was reassigned to the fuel desk on the swing shift.[18]

On the other hand, the record shows that as store clerk, she was not awarded the overtime customarily enjoyed in her pre-strike position as fuel clerk. Respondent has not shown that this failure to restore Maines with all the benefits previously enjoyed to have been justified by supervening economic considerations. Accordingly, Respondent thereby violated Section 8 (a) (3) and (1) of the Act.

d. Steve Zahuranec

Zahuranec after the strike was restored to his former position as a fuel jockey. Respondent's payroll records show that prior to

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18. Proior to the strike, and until October 28, when Winters was discharged, Maines' assignment on the fuel desk was on a "swing shift" basis. After the discharge of Winters, she worked as the latter's replacement from 11 p.m. to 7 a.m. until the strike began.

the strike and since January 1, 1979, Zahuranec was assigned overtime during 39 separate weeks. After the strike, he was offered overtime on but a single occasion and declined it. According to Zahuranec, his pre-strike overtime was attributable to the fact that he regularly worked on Sundays, an overtime shift, and also approximately twice weekly when he earned a half hour of overtime for transporting oil from Respondent's storage area to its sales area with his own pick-up truck.

Felix testified that since the strike, oil and gasoline sales had declined significantly and that in consequence fuel jockeys were not assigned overtime except on what may be considered an emergency fill-in basis. Also the fall off in oil sales volume enabled transport of oil without need for a motor vehicle and permitted this work to be done during regular working hours. Payroll records in evidence are not inconsistent with this testimony and I credit Felix in this respect.

However, the reduction in sales volume fails to explain the denial, after the strike, of the additional overtime shift Zahuranec enjoyed prior to the strike. Respondent's operation after the strike continued on a round-the-clock, 7-day basis. From all appearances, premium pay was as costly before the strike as after and no evidence was adduced specifically as to why this expense was not to be sustained at its conclusion. Accordingly, in this limited respect, I find that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to provide Zahuranec with the overtime he enjoyed prior to the strike.

The Remedy

A. The Refusal to Bargain

1. Preliminary Statement

The consolidated complaint in this proceeding alleges that the unfair labor practices alleged therein entailed "a course of conduct precluding the holding of a fair election among the

employees in the unit . . ." Accordingly, it is claimed that entry of a remedial order requiring Respondent to recognize and bargaining with the Union as exclusive majority representative of employees in the appropriate unit is warranted under authority of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). Such relief was authorized by the Supreme Court under conditions where " . . . the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future . . . [indicates] . . . that the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, through present, is slight . . ."[19]

2.The Demands for Recognition

Respondent in defense of the refusal to bargain first contends that the Union's various requests for recognition and bargaining were defective and insufficient to support a violation of Section 8 (a) (5). The initial request was made orally on November 3 when Nestler appeared at the truck stop simply informing Felix that " . . .we had the majority of the employees signed up" and are present for "the purpose of union recognition. . . ." This was followed by letter dated November 5, through which the Union effected a formal demand for recognition, describing the unit sought as follows:

> All full-time and part-time employees employed by United Oil Corporation at your Kylertown Truck Stop 21, Clearfield County.
>
> Excluding: All other employees and guards, professional employees and supervisors as defined in the Act.

On November 11, by telephone, Nestler again iterated to Felix a demand for recognition, at which point, Felix expressed the desire for "a fair election".

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19. 395 U.S. at p. 614.

Nonetheless, Respondent contends that the aforesaid demands were in an inappropriate unit as the Union at all times material sought inclusion of employees of concessionaires. The defense in the circumstances, is lacking in merit. Insofar as this record discloses, all formal and informal communication by the Union as to the employees sought was confined to employees of the Respondent. Hence the claim on behalf of Respondent that the requests for recognition were fatally defective is based upon matters collateral to the exchange between the parties which preceded rejection of recognition. It rests upon the fact that the organization drive was not only waged among Respondent's employees at the truck stop, but also employees of a restaurant operated independently pursuant to lease. Only after the Union filed its representation petition in Case No. 6-RC-8654 on December 7, did it become manifest that the Union sought inclusion of the restaurant employees in the unit. In his Decision and Direction of Election dated January 29, 1980, the Regional Director concluded that restaurant employees were not employed by the Respondent, that no joint employer relationship existed which would warrant their inclusion, and that therefore said individuals were to be excluded.

The question presented is whether a demand, though sufficient to apprise the employer of the employees sought at the time of rejection, is imperiled by a subsequently manifested dispute within the frame work of that general unit description which is subsequently in a representation proceeding, resolved against the Union. I think not. The principle endorced by the Supreme Court in *Gissel, supra,* is remedial in nature, and as such, is to be construed and applied without frustration through technical conceptions founded upon the irrelevant. consistent therewith, the propriety of a Union's demand ought be controlled solely with reference to knowledge possessed by the employer when it opts to reject a demand, which, as here, on its face was co-extensive with the unit ultimately deemed appropriate. Here, no substantial variation appears in the scope of the unit defined in the Union's letter of November 5 and that ultimately set forth as

appropriate in the Regional Director's Direction of Election of January 29, 1980.[20] The record is devoid of evidence signifying that on November 11, when Felix rejected the Union's demand, Respondent was mindful that the Union was seeking inclusion of restaurant employees within the unit. Insofar as this record discloses, Respondent was not apprised of that fact until sometime after the Union filed its election petition on December 7. The subsequently declared position of the Union seeking to include within the unit a class of employees which later was rightfully excluded, constitutes no more than a supervening event which failed to alter the facts existing at the time that recognition was rejected, and serves as no impediment to the availability of the special remedy sanctioned by *Gissel Manufacturing Co., supra.*

B. The Appropriate Unit

The complaint alleges, the answer admits, and I find that the following employees constituted a unit appropriate for purposes of collective bargaining:

> All full-time and regular part-time employees of the employer at its Stop 21, Kylertown, Pennsylvania, facility including diesel fuel station employees, gasoline station employees, store employees and motel employees; excluding employees of the leased operations, confidential employees and guards, professional employees and supervisors as defined in the Act.

C. The Union's Majority

On behalf of the General Counsel's claim that the Union represented a majority, some 20 authorization cards were received in evidence. The cards themselves include a clear and unambiguous disignation which on their face authorize the Union to represent and bargain on behalf of the signer. No dispute exists as to the cards executed by employees listed on Appendix B attached hereto. Said cards are found to have been authenticated by credible evidence and to represent valid

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20. Compare Joint Exhibit 1 with Joint Exhibit 3.

designations contributing to the Union's alleged majority in this proceeding. Based thereon, I find that as of November 11, when the Union made its final demand, which Respondent rejected, it possessed at *least 13 signed* designations.[21]

A dispute exists as to validity of the authorization cards in evidence bearing the signatures of *Marion Welker, Charles Gibbons* and *Jean Kerns.*

Respondent challenges the card of Charles Gibbons as having been executed upon an improper representation. The alleged infirmity is founded upon the segment of testimony exacted from Gibbons on cross-examination by Respondent's counsel, which is set forth below:

Mr. Zamboldi: Did another employee present it [the authorizatin card] to you?

Gibbons: Yes. Sharon Shimmel.

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21. It is noted in this connection that a properly authenticated card bearing the signature of David F. Hoover, Jr. was received in evidence. However., as that card was dated November 15, it has not been counted in assessing the Union's status. Further, the card of *Vera Lockey* is rejected. Lockey, together with corroborating witness Leid, afforded incredible testimony in connection with the union activity of Andrea Winter. Although I shall count the card of Julio Leid, because her testimony authenticating her own designation was supported by collateral evidence of a truthful nature, the authenticating testimony in the case of Lockey is suspect and my general distrust thereof requires rejection of testimony that she actually signed the card prior to the critical date. The card of *Andrea Winters* is rejected on grounds that she was lawfully terminated prior to the critical date for assessment of the Union's majority. In counting the card of *Delores Maines,* I have not overlooked the fact that it was dated November 1, 1979, but not actuallysigned until November 5, 1979. Based on the credited testimony of Maines, I find that she did in fact designate the Union on November 5, and that her card contributes to the alleged majority of the Union in this proceeding.

Mr. Zamboldi: When she requested that you sign it, what did she tell you?

Gibbons: They just told me that they were trying to get a union in at the truck stop and that's all she told me.

Mr. Zamboldi: Did she tell you that you were the only one at the stop that hadn't signed a card at that time?

Gibbons: Yes she did.

In counting the card of Gibbons, I note that such a shot-gun response to prejudicially leading examination with respect to the issue of fraud in the inducement, is deemed too unreliable to warrant credence with respect to representations made to Gibbons at the time he signed. Furthermore, Gibbons read the card before signing and there is neither objective nor other form of evidence suggesting that he relied upon any such statement in designating the Union. In *Marie Phillips, Inc.*, 187 NLRB 340 (1969), the Board stated:

> We continue to believe that a showing, without more, of a misrepresentation as to the number of others who have signed is insufficient to invalidate a clear and unequivocal designation card signed by an employee. This is so because such a card must be presumed to express the individual intent of the signer regardless of the wishes of others.
>
> * * *
>
> Where the objective facts, as evidence by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was a decisive factor in causing an employee to sign a card, we shall not count such card in determining the Union's majority. However, . . . where the only indication of reliance is the signer's subsequent testimony as to his subjective state of mind when signing the card, such showing is insufficient. to invalidate the card.

Based upon the foregoing, even if convincing evidence existed that Gibbons' card was solicited on a representation that all others had signed, it would, in the circumstances presented here, be counted as a valid designation of the Union. Respondent's challenge to the card of Gibbons is therefore found lacking in merit and his card shall be counted towards the Union's majority in this case.

Respondent also contests the cards of Jean Kerns and Marion Welker. It is claimed that both were executed upon representations that initiation fees would be $5 if they signed before, but $50 if they waited until after the Union were recognized. See e.g. *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). The testimony of Kerns and Welker that any misrepresentations were made prior to completion of their designations is discredited. Kerns impressed me as laboring under a bias, which was confirmed by her testimony that she neither read nor understood the implications of signing. Her attempt to repudiate her card struck the undersigned as based upon contrived testimony.[22]

With respect to Welker, her signature was solicited by Kerns. She claims that Kerns told her that "if you sign it now, it would cost you $5, . . . if the Union got in and if you didn't sign it and the Union got in, it would cost you $50." As indicated, Welker's card was dated November 10. As in the case of Kerns, I find that substantial credible evidence does not exist substantiating that such a representation was made prior to her execution thereof. Welker's lack of capacity for recollection was obvious. Indeed she testified that it was possible that the statement concerning initiation fees might have been made after she signed her card. If

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22. Kerns' card was improperly dated October 28. In finding that it was executed prior to November 11, it is noted that she testified that she was asked to sign a card by Leid "probably around the first week in November, I imagine." While unwilling to credit testimony of Leid that she obtained the completed card from Kerns on November 3, an inference that the Kerns' card was executed in advance of the critical date is supported by testimony of Welker. Thus, Welker signed on November 10, and as her card was solicited by Kerns, it is fair to assume that Kerns had already done so.

such a representation was made, and I doubt that it was, her testimony was too uncertain to establish grounds for voiding an otherwise valid designation.

Based on the foregoing, I find that, as of November 11, the Union possessed 17 valid designations from unit employees. The parties stipulated that as of that date, the unit consisted of at least 27 employees. The status of 3 others was disputed: discriminatee Andrea Winters, shift manager Gregory Hevell,[23] and Kenneth McDowell. For reasons heretofore stated, Winters has been excluded and Hevell included. With respect to McDowell, whom the General Counsel would exclude, and Respondent include, it is my view that the record is inconclusive as to his status. In any event, the issue need not be resolved. For assuming that he was properly includable, the Union as of November 11, had been designated by 17 employees in a unit of 29.[24]

D. Conclusions as to the Refusal to Bargain

In my opinion, the unfair labor practices found herein are subject to remedy in conventional fashion under conditions adequate to facilitate an atmosphere in which a fair election could be conducted. Respondent's unlawful conduct except for those entailed in the restoration of strikers ended prior to the Union's first formal demand for recognition on November 3. Certain violations including interrogation, instructing an employee to engage in surveillance, and promising a benefit to Zahuranec, all involved unfair labor practices with respect to an employee who

23. Felix was assisted by Shift Supervisor Greg Hevell. The complaint alleged that Hevell was a supervisor and agent of the Respondent. In his post-hearing brief, however, the General Counsel "acknowledges that Hevell is includable in the unit as a nonsupervisory employee. . . ." Previously, the Regional Director for Region 6 of the National Labor Relations Board issued a Decision and Direction of Election on January 29, 1980, in which Hevell was excluded from the unit as a statutory supervisor. In the instant proceeding, though issue was joined via the pleadings in this regard, no effort was made to litigate the status of Hevell. In the circumstances, but with some reluctance, I shall accept the General Counsel's post-hearing concession.

24. Appendix C attached hereto lists employees whose cards, though contested by Respondent, have been counted as valid designations.

initially had volunteered to Respondent information concerning the union activity of co-workers. Evidence that, in other respects, any representative of management sought to or actually participated in any conversation, coercive or otherwise, with an employee concerning the Union during the course of the campaign is limited to a brief exchange between Felix and Shift Supervisor Hevell. It is true that other unfair labor practices in the form of the upgrading of 5 employees to supervisory positions, and the grant of increases to this group, involved serious unfair labor practices. With respect thereto, conventional remedies under the National Labor Relations Act are ineffective to restore the *status quo ante*. Nonetheless, those benefits were extended to only five of some 29 employees, and occurred a month before the Union filed its representation petition. Indeed, insofar as the credible evidence on this record reveals, Respondent's unlawful conduct was manifested towards only 6 employees, with no unlawful threats of reprisal or discrimination involved.[25]

The Board has acknowledged that not all "serious unfair labor practices . . . are sufficiently egregious to warrant a bargaining order."[26] Although the line between patterns of misconduct which meet the test of pervasiveness is seldom free from doubt, having considered the total circumstances in this case, on balance, I am not convinced that the unfair labor practices herein were of a degree sufficient to prevent the holding of a free and fair election in the future, and, accordingly, I shall dismiss the 8 (a) (5) and (1) allegations in the complaint.

E. General Remedial Provisions

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

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25. See e.g. *C & E Stores, Inc., C & E SuperValue Division*, 221 NLRB 1321, 1327.

26. *California Pellet Mill Company*, 219 NLRB 435, 439.

Having found that Respondent violated Section 8 (a) (3) and (1) of the Act by failing to provide unfair labor practice strikers Leid, Maines, and Zahuranec overtime they enjoyed prior to the strike, Respondent shall be ordered to restore such privileges immediately, and to make whole said discriminatees for earnings lost by virtue thereof, with backpay to be computed on a quarterly basis pursuant to *F.W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651. [27]

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent independently violated Section 8 (a) (1) of the Act by coercively interrogating an employee concerning the union activity of co-workers; by instructing an employee to report on the union activity of co-workers; and by promising wage increases, granting wage increases, and promoting employees, to discourage their support of the Union.

4. Respondent violated Section 8 (a) (3) and (1) of the Act by denying unfair labor practice strikers Delores A. Maines, Julio C. Leid and Eugene S. Zahuranec, overtime benefits they enjoyed prior to the strike.

5. Except as heretofore found, Respondent has not engaged in any other unfair labor practices within the meaning of the Act.

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27. See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, upon the entire record in this case, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[28]

ORDER

Respondent United Oil Manufacturing Co., Inc., Kylertow.., Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union activity, instructing employees to engage in surveillance and to report on the union activity of co-workers and promising wage increases, granting wage increases, or reclassifying or promoting employees to discourage them from supporting a union.

(b) Discouraging membership in a labor organization by denying overtime benefits, or otherwise discriminating against employees with respect to their wages, hours or tenure of employment because they have engaged in activity protected by the Act.

(c) In any like or related manner interfering with, coercing, or restraining employees with respect to rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, deemed necessary to effectuate the policies of the Act.

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28. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Restore overtime benefits enjoyed by Julio Leid, Eugene Zahuranec and Delores Maines prior to the strike, and make them whole for the discriminatory denial thereof following their reinstatement in the manner set forth in the section of this decision entitled "The Remedy".

(b) Post at its place of business in Kylertown, Pennsylvania, copies of the attached notice marked "Appendix A".[29] Copies of said notice on forms provided by the Regional Director for Region 6, shall after being signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspiscuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 6 in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. September 5, 1980

Joel A. Harmatz
Administrative Law Judge

29. In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A JD-529-80

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A TRIAL IN WHICH ALL PARTIES WERE REPRESENTED BY THEIR ATTORNEYS AND AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND TO CARRY OUT ITS TERMS.

The National Labor Relations Act, gives you, as employees, certain rights:

To engage in self-organization;
To form, join, or help a union;
To bargain collectively through a representative of your own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any or all of these things.

Accordingly, we give you these assurances.

WE WILL NOT interrogate you concerning union activity or tell you to spy on co-workers and to report on their union activity, and WE WILL NOT promise you benefits, grant you benefits, or promote you, in order to discourage you from engaging in activity on behalf of AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590 a/w UNITED FOOD AND COMMERCIAL WORKERS' INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

WE WILL NOT discourage membership in the aforesaid Union, or any other labor organization by denying employment benefits to you because you have engaged in activity on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights set forth at the top of this notice.

WE WILL restore overtime benefits enjoyed prior to the strike by JULIO LEID, DELORES MAINES and EUGENE ZAHURANEC, and we shall make them whole for losses they sustained because we denied such overtime after the strike, with interest.

UNITED OIL MANUFACTURING CO., INC.
(Employer)

Dated _____ By _____ _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building - 10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219 - Telephone No. (412) 644-2969.

APPENDIX B

Name	Date Signed
1. Joyce Hockenberry	10/28/79
2. Julio C. Leid	10/28/79
3. Robert J. Pearce	10/28/79
4. Eugene Steve Zahuranec	10/28/79
5. Sharon A. Shimmel	10/28/79
6. Don C. Murray, Jr.	11/02/79
7. Richard P. Michaels	11/01/79
8. Mark Anthony Bezilla	11/01/79
9. Anthony Fenush	11/02/79
10. Steve Pelton	11/10/79
11. Catherine L. Sedlak	11/02/79
12. Doug Turner	10/28/79
13. Lester Zimmerman	10/28/79

APPENDIX C

Name	Date Signed
1. Delores Maines	11/05/79
2. Charles Gibbons	11/03/79
3. Jean Kerns	11/ /79
4. Marian Welker	11/10/79